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No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff-Appellant
and
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff-Appellant
v.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendant-Appellees
and
ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant-Appellee

Appeal From the United States District Court for the Eastern District of Michigan

JURISDICTIONAL STATEMENT

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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association, appellants, submit this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and order

of the United States District Court for the Eastern District of Michigan, Southern Division, dated and entered on December 19, 1960.

OPINIONS BELOW

The opinion of the specially constituted District Court of three judges is reported at F. Supp. .* The report of the Interstate Commerce Commission is found at 312 I.C.C. 185. A copy of the opinion of the District Court is attached hereto as Appendix A. A copy of the final order of the District Court is attached hereto as Appendix B.

BASIS OF JURISDICTION

I

This is an action brought by the Brotherhood of Maintenance of Way Employes, in which the Railway Labor Executives' Association intervened as plaintiff, to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2), approving the merger of the Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company, subject to certain conditions for the protection of employees purportedly imposed in accordance with the mandate of subparagraph (f) of section 5(2). The Commission held that said mandate requires only the imposition of conditions providing partial financial compensation to employees after, and on specific condition that, their position with respect to their employment has been worsened, notwithstanding the fact that subparagraph (f) states that the

* The opinion of the District Court is not officially reported as yet but was issued on December 7, 1960, in Civil Action No. 20,575.

Commission shall impose conditions which provide that for a period of up to four years (depending upon a particular employee's length of service) following the effective date of its order the transaction approved "will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment."

II

The final judgment and order of the United States District Court for the Eastern District of Michigan, Southern Division, was dated and entered on December 19, 1960. Notice of appeal was filed in said Court on January 9, 1961. An application for stay of the dissolution of a temporary restraining order, entered on October 14, 1960 preserving the employment status quo on the railroads involved, was denied by order of this Court on January 23, 1961 without prejudice to its renewal upon prompt docketing of this appeal.

III

The jurisdiction of this Court to review on appeal the final judgment and order of the District Court is conferred by 28 U.S.C. § 1253, 62 Stat. 926.

IV

The following decisions, among others, sustain the jurisdiction of this Court to review the final judgment and order of the District Court on direct appeal in this case:

Railway Labor Executives' Association v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721;

United States v. *Lowden*, 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208;

Interstate Commerce Commission v. *Railway Labor Executives' Association*, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904.

V

The statutory provision involved is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C. § 5(2)(f)), which provides as follows:

> "(f). As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the Interstate Commerce Commission in its order approving the merger of the Erie and the DL&W violated the requirements of Section 5(2)(f) of the Interstate Commerce Act [49 U.S.C. 5(2)(f)] which section requires a fair and equitable arrangement for the protection of employee interests and as a minimum basis of such arrangement specifies that no employees of railroad carriers affected thereby shall be placed "in a worse position with respect to their employment" for a period of up to four years from the effective date of the Commission's order, depending upon the length of the employees' service, when its order approved the said merger subject to an arrangement which provides partial financial compensation for employees *after* and on specific condition that their position with respect to their employment has been worsened.

2. Whether railroad employees will be placed in a worse position with respect to their employment when, as a result of the Commission's order approving the Erie-DL&W merger, they will be deprived of their employment; placed in lower paying less desirable positions; forced to exercise their seniority rights and displace or deprive fellow junior employees of their jobs and be displaced or deprived of their jobs by fellow senior employees; forced to move their families to new places of employment, not once but an indefinite number of times during a five-year period following Commission approval until all job abolishments and displacements resulting from the merger have taken place, notwithstanding the fact that such order grants

partial financial compensation to such employees *after* these effects have occurred.

3. Whether the Interstate Commerce Commission, and the District Court in upholding the Commission, misinterpreted the plain language of Section 5(2)(f), ignored the intent and purpose of Congress in enacting that provision into law and failed to apply the clear interpretation of that provision as set forth by this Court in its decision in *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721, and *The Order of Railroad Telegraphers* v. *The Chicago and North Western Railway Company,* 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774.

4. Whether Section 5(2)(f) requires that railroad mergers be approved only upon such terms and conditions as will continue the current employees in equivalent employment for the prescribed period and will permit the economies to be realized at the expense of employees to be achieved only as the current forces are reduced by natural attrition, i.e., as deaths, retirements, resignations, etc., occur.

5. Whether the statutory three-judge court erred in refusing to consider the sworn testimony of plaintiffs' witness while accepting and relying upon excerpts from briefs and magazine articles, none of which were part of the record before the Commission or the court.

STATEMENT OF THE CASE

This is an appeal from a final judgment and order of a specially constituted United States District Court of three judges which set aside a temporary restraining

order previously entered by that court with one judge sitting and dismissed the complaint to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission issued pursuant to Section 5(2) of the Interstate Commerce Act approving the merger of the Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company, subject to the application by the merged railroad carrier of certain employee protective conditions which provide partial financial compensation to employees who are deprived of employment, placed in lower paying jobs and required to move as a result of the merger.

A hearing was held on the joint application for merger before a Commission hearing examiner. At the hearing evidence was submitted by the railroad applicants regarding their intentions with respect to employees. The evidence indicated that the merger would require five years to consummate subsequent to Commission approval. During the first year following Commission approval the merged railroad planned to abolish 403 jobs and transfer another 430 jobs to points requiring the employees holding those jobs to move their homes; during the second year 818 jobs would be abolished and 958 jobs would be transferred; the third year would find 484 jobs abolished and 481 jobs transferred; the fourth year would see 190 jobs abolished and 191 jobs transferred; finally, during the fifth year 87 jobs would be abolished and 99 would be transferred. The total for the five-year period would be 1,982 jobs abolished and 2,159 jobs transferred.

In its brief to the hearing examiner, the Railway Labor Executives' Association, an intervenor representing through its members the employees of the Erie and the DL&W as well as virtually all railroad

employees in the United States, contended that subparagraph (f) of Section 5(2) must now be applied as it originally was intended to be applied and that subparagraph (f) meant what it plainly said in providing that as a result of a merger no employees will be placed "in a worse position with respect to their employment" for four years from the effective date of the Commission's order unless they had served less than four years in which event the protective period would equal the period of their previous service. The Association contended that for the prescribed period the Commission was required to condition the merger upon the railroad's providing comparable jobs at comparable pay with such savings as were to be realized at the expense of employees to be secured through natural attrition, that is as deaths, retirements, resignations, etc., occur. Such a method of securing the benefits of the merger could not work a hardship on the merged railroad since its evidence showed that while 4,141 jobs were being abolished and transferred, 12,116 would be created by attrition.

In support of its position, the Railway Labor Executives' Association relied upon the plain language of Section 5(2)(f), its legislative history and the interpretation placed upon Section 5(2)(f) by this Court during the course of its opinion in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721.

The hearing examiner recommended the approval of the merger and the rejection of the Association's position but he did not attempt to discuss that portion of this Court's opinion in *Railway Labor Executives' Association* v. *United States, supra*, relied upon by the Association. The examiner recommended the imposi-

tion of the so-called "New Orleans" conditions which were evolved subsequent to this Court's decision in *Railway Labor Executives' Association* v. *United States, supra,* and provide partial financial compensation to employees whose position with respect to their employment has been worsened. The "New Orleans" conditions, however, do not prevent the worsening of that position. For example, these conditions do not protect an employee from being deprived of employment by the abolishment of his job; they do not protect an employee from a loss of accumulated annuity rights under the Railroad Retirement Act in the event he is deprived of his employment; they do not protect an employee from continued moves which result from later job abolishments and transfers resulting from the merger; and, most important of all in the light of the continual shrinkage of its plant by the railroad industry, they do not protect him from being forever deprived of employment in the railroad industry, an industry in which he may have spent years developing skills which are not readily adaptable to work in other industries.

The Association filed exceptions to the employee protection recommendation of the examiner and asked to be heard by the appellate division of the Commission to which merger cases are referred, Division 4. On the motion of the Erie and the DL&W the Division 4 proceeding was eliminated and the matter was referred directly to the full Commission which heard oral argument.

The full Commission affirmed the Examiner's recommendations on September 13, 1960, and in doing so made no mention of those portions of this Court's decisions in *Railway Labor Executives' Association* v.

United States, supra, and *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company,* 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774. The latter case was decided subsequent to the filing of the Association's brief to the examiner and was relied upon before the Commission as confirming by dictum this Court's interpretation of Section 5(2)(f) in the former case.

On October 7, 1960, ten days before the Commission's order was to become effective, the Brotherhood of Maintenance of Way Employes, a railway labor union the president of which is a member of the Association, instituted this action against the United States and the Interstate Commerce Commission by filing a complaint with the United States District Court for the Eastern District of Michigan. The complaint requested the issuance of a temporary restraining order pending a hearing on the merits by a statutory three-judge court. The Erie and the DL&W intervened as party-defendants on October 10, 1960.

After notice to all parties a hearing was held on October 12, 1960, before a single judge on the issuance of a temporary restraining order at which the Association intervened and all parties were given full opportunity to present evidence. The plaintiffs informed the court that they were not interested in obstructing the merger of the railroads but merely wished to maintain the employment situation in status quo until the protective conditions required by Section 5(2)(f) could be imposed for the protection of employees. The hearing consumed the entire day and the court issued a temporary restraining order on October 14, 1960, requiring the railroads to maintain the status quo

regarding employment after they merged on October 17, 1960.

A hearing on the merits was held on November 15, 1960, before three judges at which no additional evidence was received, however, argument was held on the issue of the interpretation of Section 5(2)(f).

The District Court issued its decision on December 7, 1960, in which it called for the dismissal of the complaint and the dissolution of the temporary restraining order. *Again no mention was made* of those portions of the decisions of this Court in *Railway Labor Executives' Association* v. *United States, supra,* and *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company, supra,* relied upon by plaintiffs-appellants. The Court's decision also informed the parties that an order consistent with its decision might be presented.

On December 8, 1960, plaintiffs-appellants filed a motion to maintain the status quo pending appeal to this Court. An argument was held on December 19, 1960, before the three judges of the District Court (no additional evidence was received) and the court informed the parties that it would sign two orders, one dismissing the complaint and setting aside the temporary restraining order and another denying the motion to maintain the status quo pending appeal to this Court. These orders were signed and entered on December 19, 1960. Notice of appeal was filed on January 9, 1961.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is substantial. Although jurisdiction in this case is conferred as a

matter of right by statute it is significant that several of the important reasons which guide this Court in exercising its discretion to grant petitions for certiorari are present here and attest to the substantial nature of the question presented.

First, the District Court has decided an important question involving the construction of a federal statute enacted in the interests of the morale and welfare of all employees comprising the railroad labor force in the United States and in furtherance of the national transportation policy. The question has not been decided by this Court (although dictum contained in certain of its decisions indicate this Court's interpretation of the question) but the question should be decided by this Court, particularly in view of the railroad industry's sudden *en masse* utilization of the merger provisions of Section 5(2) resulting in a direct, immediate and serious threat to the labor force of that industry.

Second, the question has been determined by the District Court in a manner contradictory of the interpretation placed upon Section 5(2)(f) by this Court and contrary to the clearly expressed Congressional intent in providing the legislation embodied in that statute as well as the plain language of the provision itself.

Third, the District Court in supporting its decision has acted contrary to and in conflict with the applicable decisions of this Court governing the interpretation of statutes and their legislative history.

Each of the reasons for regarding the question as substantial will be briefly discussed hereunder:

A.

1. It is now well established by decisions of this Court and acts of Congress that the morale and welfare of the railroad industry's labor force is of importance to the United States. *United States* v. *Lowden,* 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208; *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721. It is also beyond question that Section 5(2)(f) was enacted in furtherance of the national transportation policy. That policy, the promotion of a sound and efficient national transportation system, was the same in 1933 when Congress enacted the Emergency Railroad Transportation Act of that year (48 Stat. 211) as it was in 1940 when it enacted Section 5(2)(f). The 1933 act admittedly contained prohibitions against the discharge of employees as a result of the utilization of its provisions and the 1940 act contains substantively the same provisions. The Congress added subparagraph (f) to Section 5(2) to protect the welfare and preserve the morale of railroad employees in the face of the enormous threat to employment in the railroad industry posed by the liberalization of the merger provisions of the Interstate Commerce Act accomplished by the enactment of Section 5(2).

In time of great financial peril to the railroad industry, the Congress enacted the 1933 Act with a provision to protect railroad *employment.* That provision was specifically enacted in furtherance of a national transportation policy which did not change between 1933 and the enactment of the 1940 Act.

2. The primary question now before this Court has not been specifically ruled upon by it but it should be

decided by this Court. The Congress enacted Section 5(2) to ease the way for the voluntary merger of railroads in this country. Quite naturally Congress expected immediate and extensive use to be made of that provision as the railroad industry had indicated such a provision was vital to its financial recovery. At the same time Congress was aware that the vast majority of savings accomplished through the merger of railroads is realized at the expense of the labor force and so it provided very specific protection for employees as a counter to the threat which it had presented to them. It was the same threat, but to a greater degree, that it had provided in the 1933 Act and it provided the same protection against that threat.

The railroad industry, however, for reasons best known to itself did not utilize the provisions of Section 5(2) to merge railroads although it did use the statute to consolidate individual facilities of particular railroads, secure trackage rights over each other's lines and the like. For these minor purposes the application of financially compensatory conditions was adequate and, in fact, was suggested to the Commission by the railroad brotherhoods. In 1957, a merger took place between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railroad Company but at that time there was no indication that the attitude of the industry toward mergers had changed and that merger alone certainly presented no threat to the railroad labor force in the United States, therefore, no objection was raised to the imposition of the "New Orleans" conditions.

The following year, however, the Interstate and Foreign Commerce Committee of the United States Senate stated in a report that the railroad industry had

not "been sufficiently interested in self-help in such matters as consolidations and mergers of railroads." S. Rep. 1649, 85th Cong., 2nd Sess., p. 11 (1958). This statement and perhaps other unknown reasons precipitated a virtual tidal wave of mergers unprecedented in the history of this country.

The first of the mergers to be considered and approved by the Commission was that involving the Norfolk and Western Railroad Company and the Virginian Railway Company. Those railroads executed an agreement with the chief executive officers comprising the Railway Labor Executives' Association to protect the *employment* of all employees involved in the merger by having natural attrition control the abolishment of jobs therefore, there was no reason to raise in that case the issue here presented.

The Erie-DL&W case was the next merger to be considered by the Commission and as those railroads refused to consider the execution of the type of agreement signed by the Norfolk and Western and Virginian the issue was presented to the Commission for decision.

The United States and the Interstate Commerce Commission in their joint brief to the District Court pointed out that there are now in various stages of consideration seven additional mergers involving the Seaboard Air Line Railroad Company; the Atlantic Coast Line; the New York Central; Baltimore and Ohio; Chesapeake and Ohio; Chicago, Burlington and Quincy; Great Northern; Northern Pacific; Spokane, Portland and Seattle; Norfolk and Western; New York, Chicago and St. Louis (Nickel Plate); the Wabash; Southern; Central of Georgia; Atchison, Topeka and Santa Fe; Western Pacific; Southern Pacific; Milwaukee; and Rock Island.

In addition, the New York Central and Pennsylvania explored a possible merger of their roads; the Pennsylvania has indicated that it will attempt a merger with the Norfolk and Western after the latter railroad obtains through merger the Nickel Plate and the Wabash; and the Commission has recently approved one merger involving the Soo Line, Wisconsin Central and the Duluth, South Shore and Atlantic and a second involving the Chicago and North Western and the Minneapolis and St. Louis.

Little imagination is needed to picture the severe and extensive adverse effects that approval of such mergers will have on the morale and welfare of the railroad labor force unless the type of protection intended by Congress under Section 5(2)(f) is provided.

It has taken twenty years for the railroad industry to utilize the tremendous economic weapon which Congress placed in its hands in 1940, certainly the employees of that industry should not be prevented from utilizing at this time the shield which Congress provided against the wielding of that weapon.

B.

1. When plaintiffs-appellants presented their case to the District Court they relied upon an interpretation of Section 5(2)(f) set forth in this Court's opinion in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721. At no time did plaintiffs-appellants contend that this Court's decision in that case disposed of the issue presented here. On the contrary, they pointed out that that case involved the effect of the four-year provision in Section 5(2)(f) *after* that period of time had elapsed while the instant case involves the question of the type

of protection which must be applied *before* the period has expired.

In relying upon *Railway Labor Executives' Association* v. *United States, supra,* plaintiffs-appellants merely cited the fact that the so-called Harrington Amendment, which with some modification became the second sentence of Section 5(2)(f), as originally introduced would have required the Commission to condition mergers upon the continued employment of all employees at equivalent wages; that the Harrington Amendment as modified by the Wadsworth motion to recommit was unchanged in substance which is confirmed by all who supported its recommittal; and that this Court, in the *Railway Labor Executives' Association* case, *supra,* recognized the fact that the bill as reported out of the second joint conference amended the Harrington Amendment in only one respect, that is, the length of time during which it would be effective subsequent to Commission approval of a merger. (339 U.S. at 151-154.)

Plaintiffs-appellants also relied upon the opinion of this Court in *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company,* 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774, decided subsequent to the filing of their brief to the Commission hearing examiners. Here again plaintiffs-appellants made no claim that this Court's decision in the *Telegraphers* case was dispositive of the present issue but looked to this Court's reliance upon Section 5(2)(f) as an example of Congressional policy protecting *employment* under the provisions of the Interstate Commerce Act. Plaintiffs-appellants also pointed out the recognition given by the dissenting opinion in the *Telegraphers* case to this Court's interpretation of Section

5(2)(f) in the *Railway Labor Executives' Association* case and the dissenting opinion's disagreement with that interpretation. The District Court, however, ignored the specific portions of those opinions which plaintiffs-appellants relied upon stating that it deemed the specific holding of this Court in each case to be "inapposite to the issue here." (Appendix A, p. 7a.) The District Court noted that the dissenting opinion in the *Telegraphers* case "specifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to 'freeze existing jobs.' The majority opinion, however, never reached this question." (Appendix A, p. 8a.)

2. The plaintiffs-appellants also relied upon the unusually clear legislative history of Section 5(2)(f). It was pointed out that the Harrington Amendment as originally worded prohibited discharge or displacement of employees as a result of mergers, and with this the District Court agreed (Appendix A, p. 5a); it was pointed out that the modified language of the Harrington Amendment as set forth in the Wadsworth motion to recommit did not change the substance of the original language and Representative Harrington himself confirmed this as did *every* member of the House who spoke in support of the motion. Representative Harrington expressed as follows the effect of the Wadsworth motion which contained the phrase "worse position with respect to employment":

> "The motion to recommit, which will shortly be made by . . . [Mr. Wadsworth], will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, *with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment* . . .

"The labor protective provision, which so many of us favor, is beneficial to all railroad employees. It protects the public against the slow death and the withering of entire communities, that always accompanies railroad consolidations. It is good for the railroad industry, because it will stay the hand of railroad financial interests which, instead of squeezing the water out of the capitalization of that industry, are bent upon reducing the physical plant of our great railroads, so necessary in time of war or in time of peace and prosperity . . . *By the adoption of this provision in the transportation bill, the government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers.* But this provision also contains a clause that permits the industry, through the process of collective bargaining, to work out its problems in a democratic manner.

"Without this labor protective provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. *With this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur.* If S. 2009 will bring to the railroad industry the prosperity its supporters contend for it, then *the natural attrition will shortly have absorbed the employees that otherwise would be eliminated* if this Congress does not now deal with this problem." (Emphasis supplied.) 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5871.

It was also pointed out that *not one member of the House expressed a contrary view* and one or perhaps two members thought that the modified language gave more protection to employees than did the original

language. It was emphasized that the modified language of the Harrington Amendment was restricted by the joint conference committee only as to the time it would be effective following a particular merger and this fact was confirmed even by the House members of that committee who had opposed both the original and modified language of the amendment.

The District Court was also informed that the continued substantive effect of the original language was confirmed by the official Senate interpretation of the provision placed in the Congressional Record by the Senate author of the 1940 Act, Senator Wheeler. 86 Cong. Rec., Part 10, 76th Cong., 3rd Sess., pp. 11766 and 11768.

Without discussing this legislative history the District Court states that the original language of the amendment was not adopted into law; that the Act contains no language equivalent to the original language; and, that "Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent." (Appendix A, p. 6a.)

3. The District Court relied on the "contemporaneous construction" doctrine holding that the Commission in its 1941 report "referred to 5(2)(f) as granting only compensatory benefits." (Appendix A, p. 6a.) The portion of the report relied on by the Court, however, merely states the type of conditions it imposed and makes no positive statement that such conditions are the only conditions required by Section 5(2)(f). At best this "contemporaneous construction" by the Commission is a negative construction. In any event, it was established by this Court in *Railway Labor*

Executives' Association v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373, 380, 67 S. Ct. 717, 86 L. Ed. 904, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.

4. The District Court relied heavily on articles, not introduced in evidence, from 1940 issues of magazines of five of the twenty-three railway brotherhoods affiliated through their chief executive officers with the Railway Labor Executives' Association. The Court states that these articles clearly assert the brotherhoods' understanding of Section 5(2)(f) as granting compensation to employees who lose their jobs as a consequence of merger. (Appendix A, p. 6a.) Reliance upon this type of material is clearly contrary to decisions of this Court such as *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L. Ed. 884. The articles cited are from magazines of a small minority of railroad brotherhoods and, at that, brotherhoods which *opposed* the Harrington Amendment because they felt insistence upon its enactment would kill the entire provision relating to mergers. In any event, the off-the-record opinions of laymen as to the effect of legislation upon them should have no bearing on the proper interpretation of that legislation by the courts.

5. Finally, the District Court relied upon a claimed Congressional awareness of the "construction" placed upon Section 5(2)(f) "by those interested in its integration and enforcement" and failure of Congress to do anything by way of clarification. (Appendix A, p. 7a.) Not only has there been no reason for the

Congress to modify Section 5(2)(f) regarding the protection it affords employees because the issue has never before been raised, but such a ground was rejected by this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904, as a means of interpreting the provisions of paragraphs 18 through 20 of section 1 of the Interstate Commerce Act (41 Stat. 477, 49 U.S.C. § 1(18)-(20)) subsequent to the passage of Section 5(2)(f).

6. The District Court also held that the plain language of the provision in question "mitigates against the plaintiffs' contention" because subparagraph (f) is "couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition much less that of guaranteed employment." (Appendix A, p. 4a.) The Court agrees that the controlling phrase is "in a worse position with respect to employment" (Appendix A, p. 4a) but claims that had Congress desired to protect employees with respect to their employment it would have followed the precise language it used in the 1933 Act or the after-enacted Communications Act of 1943, 57 Stat. 5, 47 U.S.C. § 222(f). The fallacy in the Court's reasoning here extends beyond its failure to give to the language of the controlling phrase, and particularly the term "employment", its ordinary, commonly accepted meaning because it also refused to recognize the obvious fact that Congress in modifying the Harrington Amendment combined into one phrase the words and substance of the two phrases contained in the employment protective provision of the 1933 Act. The District Court failed to acknowledge the additional fact that the legislative history of the

Communications Act of 1943 shows that Congress in 1943 recognized that employment protection had been granted railroad labor in Section 5(2)(f). In addition, it seems reasonable to assume that if Congress had meant to protect employees only to the extent of lost compensation it would have done so merely by using the very familiar term contained in both the 1933 Act and the Washington Agreement which it had before it, namely, "no worse position with respect to *compensation.*"

Further, the District Court affirmatively held that "no worse position with respect to employment" does not protect employment but makes no affirmative finding as to what it otherwise possibly could be intended to protect and yet holds that there is no "ambiguity within the structure of 5(2)(f)." (Appendix A, p. 5a.).

C.

1. The District Court in arriving at its decision in this case failed to apply the innumerable decisions of this Court applicable to statutory construction to the effect that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else is meant." *United States* v. *First National Bank,* 234 U.S. 245, 258, 34 S. Ct. 846, 58 L. Ed. 1298. See also *Western Union Teleg. Co.* v. *Lenroot,* 323 U.S. 490, 65 S. Ct. 335, 89 L. Ed. 414; *United States* v. *Resnick,* 299 U.S. 207, 57 S. Ct. 126, 81 L. Ed. 127; *Woolford Realty Co.* v. *Rose;* 286 U.S. 319, 52 S. Ct. 568, 76 L. Ed. 1128; *Southern R. Co.* v. *United States,* 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Columbia Water Power*

Co. v. *Columbia Elec. Street R. L. & P. Co.*, 172 U.S. 475, 19 S. Ct. 247, 43 L. Ed. 521.

2. The District Court also failed to apply the rules laid down by the decisions of this Court in determining from legislative history the meaning of statutory words which may be in doubt. *Mastro Plastics Corp. et al.* v. *N.L.R.B.*, 350 U.S. 270, 288; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 76 S. Ct. 349, 100 L. Ed. 309.

3. As noted above, the District Court acted contrary to the rulings of this Court in relying upon off-the-record material contained in magazines as an aid in examining the legislative history of the statute. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884.

CONCLUSION

It is respectfully submitted that whether the protection afforded by Congress to shield the labor force of the railroad industry from the effects of wholesale mergers resulting from the enactment of Section 5(2)(f), as interpreted by this Court in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721, and *The Order of Railroad Telegraphers* v. *Chicago and North Western Railway Company*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774, is to be granted or denied the employees comprising

that labor force, presents a substantial question for consideration by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *Plaintiff*,

and

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

Before: O'SULLIVAN, Circuit Judge, LEVIN, Chief District Judge, and THORNTON, District Judge.

THORNTON, District Judge. A statutory three-judge court was convened pursuant to 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-25, to hear and determine the issue presented by the complaint here filed. This Court is asked to enjoin and set aside an order of the Interstate Commerce Commission (hereinafter also referred to as either the Commission or the ICC), dated September 13, 1960 and effective October 17, 1960, approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company. The argument upon which the relief sought is premised is single in its thrust. The issue for determination is a narrow one. The order of the Commission which is being attacked contains certain provisions pursuant to 49 U.S.C.A. § 5(2)(f) of the Interstate Commerce Act (also known as the Transportation Act of 1940).

It is with the interpretation of 49 U.S.C.A. 5(2)(f), hereinafter referred to as 5(2)(f) that we are concerned. We here quote 5(2)(f), italicizing the words which are the crux of this controversy:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that *during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment*, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The sole question presented is whether this provision requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time to his service with the railroad carrier, not to exceed four years. The Commission, in its order of September 13, 1960, prescribed the so-called "New Orleans Conditions" which grant employees compensatory protection in the event of displacement or discharge.

We should perhaps here state that the merger has in fact gone ahead as per the effective date of the order with the exception of those terms which were imposed to comply with the provisions of 5(2)(f). The status of the employees of the merging railroads has not been disturbed pending this Court's decision. Such procedure was agreed upon by the respective parties at the time of the hearing on the motion for a temporary restraining order which was noticed for hearing, and held, shortly prior to the effective date of the Commission's order. The merged railroad, now the Erie-Lackawanna Railroad Company, has since become an intervening defendant by virtue of substitution for the two railroads.

To aid us in arriving at a proper conclusion the parties have submitted briefs, copies of reports relative to the proposed merger, copies of Congressional Committee reports and of pertinent sections of Congressional debates, copies of agreements (to protect employees) heretofore incorporated in prior railroad merger or combination proceedings, and copies of the proceedings before the Commission. The "New Orleans Conditions", above referred to and contained in the order of the Commission approving the merger, were compensatory protective conditions which were prescribed in ICC orders entered in railroad merger proceedings involving parties different from those here, such proceedings having taken place in New Orleans. The "New Orleans Conditions" do not embrace continued employment. We do not deem it important to our decision that these conditions be set forth here. It is plaintiffs' contention that *anything* short of actual continued employment is violative of the language and intendment of 5(2)(f) with respect to the phrase therein "being in a worse position with respect to their employment." Section 5(2)(f) requires protective conditions which are to be continued for a period of four years[1] for employees of the merging

[1] This is modified with respect to employees in the service of the railroad less than four years.

carriers. This is agreed. But the interpretation of the context of such benefits and of the mandate of 5(2)(f) is presented to us in two sharply contrasting outlines.

We believe it to be without dispute that this is the first instance since the 1940 enactment of 5(2)(f) that there has been an attempt to get judicial (or ICC, for that matter) recognition of the construction now placed by plaintiffs on 5(2)(f). In no case that has been called to the Court's attention has the construction urged by plaintiffs been placed on this Section. In no case has the proposition advanced here been previously advanced. In the numerous cases that have come before the ICC where 5(2)(f) conditions were required to be met, they were considered to have been met by various compensatory plans, continued employment not being one of them. From our reading of 5(2)(f) we are unable to find a clear expression, as plaintiffs contend, that continued employment of affected employees is required to be imposed. We believe that ordinary every-day logical reading of 5(2)(f) mitigates against plaintiffs' contention. The phrase here in issue, "in a worse position with respect to their employment" is couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition, much less that of guaranteed employment. It would appear to have been a simple matter to have incorporated the concept of continued employment in this sentence, had such been the intention of Congress. The plaintiffs' contention that the language "in a worse position with respect to their employment", being broader in scope than language granting "compensation", is that employees are required to be retained in an employment status following a merger. We do not agree that this language should be so construed. Congress could have used language clearly stating that the railroads may not discharge affected employees. Congress did precisely that in the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, and the Communications Act of 1943, 47 U.S.C.A. 222(f). It is our observa-

tion, therefore, that insofar as the plain language of 5(2)(f) is concerned, a literal approach giving effect to each phrase therein, necessitates denying the construction contended for by plaintiffs. This is to say that we do not consider that there is ambiguity within the structure of 5(2)(f). Under ordinary rules of statutory construction we would be precluded from pursuing any further line of inquiry. However, both parties to this cause claim support for their respective contentions in the legislative and operational history of the Act. We therefore review such history.

First, as the Act was originally proposed and adopted, it did not contain the specific language which is before us. As then proposed it clearly would not have called for job security or "job freeze" as a condition to authorizing a merger of railroads. It is clear also that Representative Harrington of Iowa sought to have an amendment adopted to the proposed Act which would provide that no employee should be displaced or his job impaired by a railroad merger. It appears that, as originally proposed, the so-called "Harrington Amendment" would have required such conditions to be imposed. From the offering of this amendment until the Act was finally adopted, the issue of whether or not "job freeze" should be a condition of any merger, was clearly and distinctly before the members of Congress. Whether such condition should be followed was discussed, pro and con, during the time this legislation was considered. The Harrington Amendment as originally proposed provided:

> "No such transaction shall be approved by the Commission if such transaction shall result in *unemployment or displacement of employees of the carrier or carriers*, or in the impairment of existing employment rights of said employees."[2] (Emphasis supplied.)

Such amendment was not adopted into law, nor does the Act as it exists contain any language which might be said

[2] 84 Cong. Rec. 9882 (1939).

to be equivalent to what Mr. Harrington proposed. It is clear that the members of Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent.

Second, at the time of, and following, the enactment of the Section now before us, representatives of the plaintiffs in this cause gave public expression to, and understanding of, what was accomplished by the Section before us, and clearly asserted that it was their understanding that protection was to be afforded by way of compensation to such employees as would lose their jobs or be displaced as a consequence of a merger.[3]

Third, the application and construction of the Section have been before the ICC in many cases during the twenty years since the enactment of the Transportation Act of 1940. Consistently and clearly, the ICC has interpreted the particular language in the same manner as it now contends it should be construed. It is true that the issue now made by plaintiffs in this case was not presented to, nor passed upon, by the ICC in any of the cases adjudicated in the preceding twenty years. Neither, however, did these plaintiffs, as representatives of the employees involved, there make the contention that is being made in the instant proceeding. The ICC in its 1941 report referred to 5(2)(f) as granting only compensatory benefits. Such a contemporaneous administrative construction of a statute is entitled to great weight and indeed the Commission has never deviated from that interpretation. The plaintiffs contend that they have never chal-

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[3] See Brotherhood of Maintenance of Way Employes' *Journal*, volume XLIX, pages 13 and 14 (October 1940); *The Railway Conductor*, volume 57, page 306 (October 1940); *Locomotive Engineers' Journal*, page 725 (October 1940); Brotherhood of Locomotive Firemen and Enginemen's *Magazine*, page 223 (October 1940); *Railway Clerk, Official Journal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, pages 467 and 488.

lenged the Commission's interpretation because only in recent years have wholesale mergers occurred in the railroad industry with the resultant effect of a reduction in employment opportunities. However, in at least one prior large scale merger compensatory relief was afforded employees.[4]

Fourth, it is clear also that since 1940 the United States Congress has been aware of the construction placed upon the Act by those interested in its interpretation and enforcement. It has not seen fit to indicate by any attempted clarification of the Act its disagreement with the construction uniformly placed upon it in the intervening years.

Two decisions of the Supreme Court which have been cited and argued by all parties to this controversy in support of their respective positions should be mentioned. This Court, however, deems both decisions inapposite to the issue here. In *Railway Executives Association* v. *United States*, 339 U.S. 142 (1950), the Supreme Court held that the four-year limitation in 5(2)(f) provided only a minimum period of protection for employees and that the first sentence of 5(2)(f) still required the Commission to arrange a fair and equitable solution and protect the interests of the railroad employees. In Order of *Railroad Telegraphers* v. *Chicago & North Western Railway Co.*, 362 U.S. 330 (1960), the sole question was whether a strike arising out of the railroad carriers' refusal to negotiate an agreement with a union that would prevent the railroad from abolishing any position was a "labor dispute" within the meaning of the Norris-LaGuardia Act. It is interesting to note that in this decision Mr. Justice Whittaker, writing for the four dissenting justices, spe-

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[4] The Louisville and Nashville Railroad Company Merger, 295 ICC 457 (1957), affirmed City of Nashville, Tennessee v. United States, 155 F. Supp. 98 (M.D. Tenn. 1957) affirmed 355 U.S. 63 (1957).

cifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to "freeze existing jobs". The majority opinion, however, never reached this question.

One additional observation may be in order. The decision of this Court that 5(2)(f) provides only compensatory benefits is supported by the general policy of the ICC which is to promote "safe, adequate, and efficient service and foster sound economic conditions in transportation." A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy partially through the reduction of personnel. It seems to us that if Congress had intended such a result it could have, and would have, said so in unequivocal language.

The temporary restraining order will be set aside and the complaint dismissed. An order in accordance with the foregoing may be presented.

s/ CLIFFORD O'SULLIVAN
Circuit Judge

s/ THEODORE LEVIN
Chief Judge, United States District Court

s/ THOMAS P. THORNTON
United States District Judge

Dated at Detroit, Michigan, this 7th day of December, 1960.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *Plaintiff*,
and
RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,
and
ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

Order

At a session of said Court held in the Federal Building, City of Detroit, Wayne County, Michigan, on the 19th day of December, 1960.

This cause having been briefed and argued on the merits by counsel for the respective parties and having been fully submitted at the close of hearing on November 15, 1960, and

This Court, after due consideration, having rendered its decision and stated the grounds therefor in its Opinion dated and filed December 7, 1960,

NOW, THEREFORE, in conformity with said Opinion,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' request for injunctive relief be and hereby is denied and the above-entitled action and the Complaint therein be and they hereby are dismissed with prejudice to Plaintiffs.

2. The temporary restraining order entered October 14, 1960 be and hereby is set aside and rendered null, void and of no effect.

CLIFFORD O'SULLIVAN,
Circuit Judge

THEODORE LEVIN,
Chief Judge, United States District Court

THOMAS P. THORNTON,
United States District Judge

A True Copy

JOHN J. GINTHER, *Clerk*
By RAYMOND W. BILTON
Deputy Clerk